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In the Supreme Court

of the

United States

October Term 1966

No. 742

MONDAKOTA GAS COMPANY,
a corporation,

Petitioner,

vs.

COLLINS G. REED,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Respondent Reed In Opposition

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Brief of Respondent Reed In Opposition

OPINION BELOW

The opinion of the District Court is reported in *244 F. Supp. 327.* The opinion of the Ninth Circuit Court affirming in two companion cases consolidated for trial is reported in *349 F. 2d 1020;* and in this particular case in *363 F. 2d 879.*

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 2, 1966. There was no petition for rehearing in the Ninth Circuit. Ninety days expired October 31. Notice from petitioner served on respondent advises the petition for a writ was filed in this court November 3, three days late. This court has no jurisdiction — *28 U.S.C.A. 2101 (c).*

STATUTES INVOLVED

No constitutional provisions, treaties, ordinances or regulations are involved. The petition for a writ recites five statutes of the *Revised Codes of Montana, 1947,* which petitioner says are involved. The statutes cited have no relevance or bearing whatsoever in this case.

The following portions of the *Federal Rules of Civil Procedure* and the *Montana Rules of Civil Procedure* are pertinent.

Rule 56(e), Federal Rules of Civil Procedure, provides in part:

> "(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. * * * When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

Rule 41(b) provides in part:

"(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits."

Rule 41(b), Montana Rules of Civil Procedure, is identical word for word with *Rule 41(b), Federal Rules of Civil Procedure* quoted above.

QUESTIONS PRESENTED

We do not agree that the questions listed in the petition for writ of certiorari are in fact presented, or that they were or are questions over which this court should take cognizance. The District Court in a quiet title action brought by petitioner granted a motion for summary judgment, and then subsequently denied a motion for new trial and several motions amending the original motion for new trial. The only questions presented to the Ninth Circuit Court and involved here were:

(1) Whether there was any issue of fact in the District Court as of the date when the summary judgment was granted, and whether the Court of Appeals properly affirmed that judgment.

(2) Whether there was any abuse of discretion by the District Court in denying the motion for new trial, and the several amending motions, and whether the Court of Appeals erred in

holding that there was no abuse of discretion by the District Court and in sustaining the action of the District Court in denying the said motions for new trial.

STATEMENT

We recognize that present counsel for petitioner did not appear in the case in the District Court prior to the summary judgment of August 31, 1964, that it was a new and different counsel who first filed the motion for summary judgment on September 9, 1964; and that present counsel did not get into the case until March 16, 1965, the date set for hearing on the motion for new trial. This may account for his lack of information on the detailed chronology of what took place in the case. Nevertheless, we cannot agree that the petitioner's statement in his application for writ of certiorari of the posture of the case at the time it was presented to the District Court for summary judgment is either accurate or sufficient, and we deem it necessary and advisable to supplement that statement.

A. *CHRONOLOGY OF THIS CASE.*

July 25, 1961, summons issued in the State Court, so that complaint was filed no later than that date *(R. 8)*. The complaint attempted to quiet title to federal oil and gas lease 025001. Defendants named were Industrial Gas, Inc., Fidelity Gas Company, Montana-Dakota Utilities Company, Shell Oil Company, L. B. Buchtel, and respondent Reed. Defendants removed to Federal Court

alleging a fraudulent joinder of Industrial Gas, Inc. On presentation of motion to remand petitioner through his counsel of record conceded that Industrial Gas, Inc., was fraudulently joined, and had no interest or claim in the property involved. *(Par. IV-IX, Pet. for Rem., R. 2-7; Order Den. Remand, R. 114; Section 1332, Title 28, U.S.C.A.)* Two companion cases, S-W Company v. Fidelity Gas Company, Montana-Dakota Utilities Company, and Shell Oil Company, and The First National Bank of Denver, Colorado, v. Fidelity Gas Company, Montana-Dakota Utilities Company, and Shell Oil Company, were consolidated for trial.

On *August 1, 1963,* answer of respondent Reed was filed. Federal oil and gas lease 025001, instruments committing the lease to a unit plan of development in what is called Cedar Creek Anticline, and assignments thereof by the lessee subject to a prior working agreement to petitioner were alleged and described *(Answer, R. 116; Stipulation, R. 151-155; R. 135).* In addition, respondent Reed attached photostatic copies of assignment of December 5, 1952, from petitioner to E. L. McElroy, which reserved an interest in petitioner, filed with the Bureau of Land Management on December 12, 1952, and approved March 23, 1953 *(R. 138);* assignment of May 28, 1953, from McElroy to Buchtel filed with the Bureau on August 21, 1953, and approved *(R. 141);* and an assignment of October 28, 1954, from Buchtel to respondent Reed filed with the Bureau November 1, 1954,

and approved December 1, 1954 *(R. 143)*. These instruments, all plain, unambiguous, and unequivocal, were described and attached to the answer filed in the case by respondent Reed *(R. 116)*.

August 12, 1963, pretrial conference was ordered for *September 16 (R. 124)*. *August 21, 1963,* the parties stipulated to trade for examination all documents upon which the parties relied *(R. 125)*. *September 6, 1963,* petitioner by letter to respondent outlined documents upon which petitioner might rely, one of which was a purchase agreement between petitioner and McElroy dated June 17, 1952, a copy of which was never submitted to the District Court before summary judgment. (As discussed hereafter, there was a dispute in prior litigation whether this instrument had been altered or falsified, so that federal lease 025001 may or may not have been originally included as a small part of the 30,000 acres covered by the agreement.) Petitioner also referred in the letter to respondent to the complaint only in Civil No. 1557, United States District Court for the District of Montana, an action brought by petitioner against the same McElroy to cancel or terminate the questionable purchase agreement of June 17, 1952, recited he might rely on that complaint, but again no copy of that complaint was ever submitted to the District Court or relied upon before summary judgment. *(R. 129-130)*. Except for the word description of Civil Action No. 1557 contained in an affidavit filed in the case March 21,

1964, which described the dismissal of that action for lack of diligent prosecution *(Vol. 1, p. 173; Transcript, Docket No. 19639, Ninth Circuit Court)*, the questionable purchase agreement of June 17, 1952, was never again mentioned in this case after the letter of September 6, 1963, or relied upon by petitioner in any of the proceedings prior to the date of the summary judgment of August, 1964.

On *September 16, 1963,* a pretrial conference was held. Certified copies of the documents relied upon by the respondent Reed were submitted to petitioner and the court at the pretrial conference *(R. 223)*. Counsel for petitioner was fully and carefully interrogated concerning the issues, contentions and proof relied upon by petitioner. The questionable purchase agreement of June 17, 1952, was never mentioned. The validity and authenticity of the documents submitted to the court by respondent Reed were admitted and conceded. No issue of assignment invalidity was suggested. Pretrial order issued *October 22, 1963,* with no suggestion of an issue of fact or assignment invalidity. *November 1, 1963,* separate motions for summary judgment were filed *(R. 131)*. Once again respondent Reed recognized the rights reserved by petitioner in the assignment of December 5, 1952, outlined the documents relied upon, and copies of the assignments relied upon were attached (Walker to petitioner *(R. 135)*; petitioner to McElroy *(R. 138)*; McElroy to Buchtel *(R. 141)*; Buchtel to respondent

(R. 143)). Briefs were filed opposing the motions for summary judgment. *November 8, 1963,* there was filed a stipulation of October 28, 1963, with respect to documents agree upon *(R. 151). December 12, 1963,* was a motion by petitioner to modify the pretrial order, and briefs were filed by petitioner in support thereof. Order granting motions for summary judgment issued *August 3, 1964 (244 F. Supp. 327);* form of proposed judgment was served on petitioner *(R. 157-159),* and on *August 31, 1964,* judgment in the form proposed was signed, filed and entered. It should be noted that the judgment grants to petitioner all the rights in the land involved which petitioner had reserved in its prior assgnment of December 5, 1952, to McElroy. Subsequent assignments from McElroy to Buchtel and Buchtel to respondent Reed could not, and do not affect or disturb those prior rights vesting in the petitioner fully protected as indicated *(R. 160-164).* It is significant indeed that the petitioner never at any time in any of the papers, documents, or court hearings referred to, offered the questionable purchase agreement of June 17, 1952, in evidence, nor advised the Court that petitioner was asserting or relying upon it, nor questioned the authenticity or validity of the documents relied upon by respondent, nor raised nor asserted any issue of fact whatsoever. The position taken by petitioner as of the date when summary judgment was granted is described in the subsequent order of Federal District Judge W. D. Murray of June 7,

1965 *(R. 222-223)* denying the motion for new trial as follows:

> "This attempt to question the validity of the assignment from the plaintiff to McElroy is made in this case for the first time on the motion for a new trial. The validity of the assignment to McElroy was not mentioned as an issue in either the pretrial order filed October 23, 1963, or the plaintiff's motion to modify the pre-trial order which was filed December 12, 1963. As a matter of fact, at a pretrial conference, plaintiff's then counsel conceded that the title of all of the defendants in this and the two companion cases was settled by the decision of this court in Cedar Creek Oil and Gas Company, et al., v. Fidelity Gas Co., et al., which was affirmed by the Court of Appeals in 249 F. 2d 277. At that pre-trial conference the attorney for the plaintiff stated that plaintiff in this and the two companion cases was relying on breaches of the Fidelity operating agreements which were alleged to have occurred subsequent to the final judgment in the Cedar Creek Oil and Gas case. The attack on the validity of the assignment of the Walker lease by the plaintiff to McElroy for the first time on the motion for a new trial appears to be an afterthought and that reason alone would warrant the denial of the motion for a new trial."

It is well to note that the prior Cedar Creek case was an action by the petitioner against the same defendants Montana-Dakota Utilities Company, Fidelity Gas Company, and Shell Oil Company, in which petitioner had unsuccessfully tried to quiet title to exactly the same federal oil and gas lease 025001 involved in this litigation *(9th C.C., 1957, 249 F. 2d 277; certiorari denied, 78 S. Ct. 775, 356 U.S. 932, 2 L. Ed. 2d 763)*.

The foregoing chronology illustrates clearly that during the more than three years between the time the

complaint was filed on July 25, 1961, and the date summary judgment was entered on August 31, 1964, petitioner at all times had a full, fair and complete opportunity to present to the District Court any and all claims that the petitioner might have had, as well as any and all evidence upon which petitioner relied. Petitioner conceded and admitted the validity and authenticity of all the documents before the court. Petitioner did not submit any contradictory evidence. No fact issue was raised or presented. His only position with the District Court at that time was a legal position based upon alleged defaults in performance under the base federal oil and gas lease subsequent to the date of the prior Cedar Creek judgment of July 3, 1956. Accordingly, at the time summary judgment was granted there was no issue of fact. The facts were all uncontradicted, undisputed and admitted. The opinion and order of the District Court *(244 F. Supp. 327)* was later affirmed by the Ninth Circuit Court with respect to the companion cases *(349 F. 2d 1020);* and with respect to this case in *363 F. 2d. 879.*

B. *MOTION FOR NEW TRIAL.*

September 9, 1964, through new and different counsel, petitioner for the first time attacked the summary judgment claiming an issue of fact with respect to the validity of the assignment of December 5, 1952, from petitioner to McElroy by reason of the termination of the questionable purchase agreement of June 17, 1952 *(R. 165).* This was the first time such contention was raised

in this case. In view of the chronology of the case outlined above, and the additional facts discussed hereafter, the suggestion in the motion for new trial that petitioner was presenting new evidence which he could not have discovered and presented with reasonable diligence before summary judgment is fantastic and incredible.

August 18, 1953, eight years before the complaint was filed in this case, petitioner filed a complaint in cause No. 27622 in Yellowstone County, Montana, in State Court, against the same E. L. McElroy and one E. A. Markey *(R. 71-77).* This was dismissed *December 16, 1963, for* failure of petitioner to prosecute the action with reasonable diligence *(R. 113).* On *November 4, 1953,* petitioner filed the same form complaint exactly against the same McElroy and the same Markey in Civil No. 1557 in the United States District Court for the District of Montana *(R. 13-19).* This action was dismissed by the United States District Court for the District of Montana on *October 11, 1961,* because of the failure of the petitioner to diligently prosecute *(R. 66).* These two actions filed eight years before the complaint was filed in this case directly involved the validity of the purchase agreement of June 17, 1952, which petitioner alleged was breached by McElroy. The answer in the federal court case denied that the purchase agreement submitted was in fact authentic, alleged that descriptions had been altered and falsified *(R. 58-62).* The dismissal with prejudice was an adjudication on the

merits. *(Rule 41(b) F.R.C.P.)* The plain and unambiguous assignment of December 5, 1952, relied upon by respondent Reed in this case preceded the commencement in 1953 of Civil No. 1557, and neither one of the complaints in these two prior cases filed in 1953 made any reference to, nor attacked, the validity of the assignment of December 5, 1952, upon which respondent Reed relies. On *March 9, 1954,* John Wight filed an affidavit with the Bureau of Land Management attacking the purchase agreement of June 17, 1952, without making any reference whatsoever to the prior assignments to McElroy and Buchtel upon which respondent Reed relies *(see Exhibit B-10, R. 4).* Keeping in mind that petitioner had filed two actions in 1953 attacking the validity of the purchase agreement of June 17, 1952 (but did not in those actions attack or question the validity of the subsequent assignment of December 5, 1952, on which respondent Reed relies); that petitioner had filed a third action (the Cedar Creek case), to quiet title to the same federal oil and gas lease; that he did not rely upon nor assert the purchase agreement in the District Court in this case before summary judgment; that he waited to do so for the first time until the motion for new trial filed by new and different counsel on September 9, 1964; and that he then asserted in the motion for new trial that the questionable purchase agreement of June 17, 1952, was newly discovered evidence of which he was unaware, and which he was unable to present with rea-

sonable diligence during the three-year period between the time the complaint was filed July 25, 1961, and summary judgment August 31, 1964; the Court can readily understand why we label such claims as fantastic and incredible.

Furthermore, the statements in the motion for new trial and supporting papers do not reflect any known evidence that would change the result, and are replete with statements of speculation and conjecture of what they might be able to develop and prove if permitted *(R. 168-173)*.

Present counsel for petitioner entered the case on *March 16, 1965,* at the time set for hearing of the motion for new trial, at which time he presented without supporting facts or affidavits a motion for continuance and discovery through income tax returns. Mailed *April 21, 1965,* was a motion to amend the motion for new trial. Mailed *June 3, 1965,* was a second motion to amend the motion for new trial which incorporated copy of a default judgment in the State Court secured by petitioner against the defunct Industrial Gas, Inc., the corporation which petitioner originally admitted was fraudulently joined as a defendant in this case. What possible application that default judgment in the State Court against Industrial Gas, Inc., would have to this case, has never been demonstrated. In this connection, it should be noted that during the argument on this case before the Ninth Circuit Court of Appeals, counsel for respondent re-

quested permission of the court to argue from, and leave with the court for examination; the original file of the State Court in which the default judgment had been granted against Industrial Gas, Inc. Counsel for petitioner upon being questioned by the Ninth Circuit Court consented. Accordingly, the Circuit Court had the benefit of examining the state Court file.

ARGUMENT

A. *A WRIT OF CERTIORARI IS NOT GRANTED TO REVIEW MATTERS OF EVIDENCE, NOR TO AFFORD A REHEARING ON APPEAL FOR THE BENEFIT OF ANY PARTICULAR INDIVIDUAL.*

This Court in *Magnum Import Co. v. Coty, 262 U.S. 159, 163, 67 L. Ed. 922, 43 S. Ct. 531,* said:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

See also: *Rice v. Sioux City Memorial Park Cemetery, 75 S. Ct. 614, 349 U.S. 70, 99 L. Ed. 897.*

B. *ON THE RECORD, DISTRICT COURT HAD NO ALTERNATIVE BUT TO GRANT SUMMARY JUDGMENT.*

Not only did the petitioner fail to come forward in the District Court before Summary Judgment with a disclosure of specific facts showing a genuine issue

for trial, the petitioner conceded in the District Court the validity and authenticity of all the documentary evidence before the court, and relied upon a legal theory not applicable under the admitted facts. There was no contradictory nor conflicting evidence before the District Court. The District Court had no alternative but to grant summary judgment.

Rule 56(e), F.R.C.P.;

First National Bank v. First Bank Stock Co., 1962, 9th C.C., 306 F. 2d 937;

Likins-Foster Monterey Corporation v. United States, 1962, 9th C.C., 308 F. 2d 595 at 599;

Smith v. Stone, 1962, 9th C.C., 308 F. 2d at 18.

C. *ON THE RECORD, THE DISTRICT COURT HAD NO ALTERNATIVE BUT TO DENY THE MOTION FOR NEW TRIAL.*

The record discloses conclusively that during the eight years between 1953 and 1961, when this action to quiet title was commenced, petitioner had prosecuted three separate prior actions in which the same federal oil and gas lease was involved, and in which some of the same parties or their predecessors in interest were involved, and in which the same evidence was involved that petitioner produced for the first time *after* summary judgment in this case. Furthermore through new and different counsel, petitioner endeavored on motion for new trial to change the position he had taken prior to summary judgment. Two of those prior cases were designed to terminate the purchase agreement of June 17,

1952, of doubtful authenticity, and were ultimately dismissed by their two separate courts for lack of diligent prosecution by petitioner. There has never been any factual showing in this case how that questionable purchase agreement of June 17, 1952, could affect or defeat the validity of the subsequent specific assignment of December 5, 1952, from petitioner to one E. L. McElroy, predecessor in interest of respondent Reed. In any event, the questionable purchase agreement of June 17, 1952, was never presented to the District Court prior to summary judgment, and there was never argument to the District Court prior to summary judgment that such agreement if it was valid and existing had any effect on the validity of the plain and unambiguous instruments upon which respondent Reed relies. The third prior action, commonly called the Cedar Creek Case *(Cedar Creek Oil and Gas Company, et al., v. Fidelity Gas Co., et al., 9th C.C., 1957 249 F.2d 277, cert. den. 78 S. Ct. 775, 356 U.S. 932; 2 L. Ed. 2d 763)*, was a quiet title action brought by petitioner and others against some of the same defendants involved in this action, involved the same federal oil and gas lease, and involved similar issues of law and theories of law relied upon by petitioner in the District Court in this case, which prior action was litigated and decided adversely to petitioner.

On moton for new trial in this case, petitioner for the first time asserted in the guise of "newly discovered evidence which he could not have produced with dili-

gence before summary judgment," the same evidence which had been involved in the prior cases, and all of which had been in the possession of, and within the knowledge of, petitioner for at least eleven years prior to the time summary judgment was granted in this case. The District Court was vested with a vast discretion in considering the material presented on the motion for new trial. The District Court exercised its discretion adverse to petitioner. There were ample grounds for doing so — (1) the evidence offered was not "newly discovered"; (2) the evidence could have been produced and presented by petitioner prior to summary judgment with reasonable diligence; (3) the evidence for the most part was wholly speculative and conjectural and unauthenticated and not specific; (4) the evidence offered did not suggest nor indicate that a new trial would change the old result; (5) for the most part the evidence asserted was not competent or material. To deserve a new trial, it was incumbent upon petitioner to show an abuse of that discretion by the District Court. Petitioner failed to show any basis upon which the Ninth Circuit Court could have held an abuse of discretion by the District Court.

Moylan v. Siciliano, 1961, 9th C.C.; 292 F. 2d 704 at 705-706;

Pacific Contact Laboratories, Inc., v. Solex Laboratories, Inc., 9th C.C., 209 F. 2d at 533, cert. den. 75 S. Ct. 26, 348 U.S. 816; 99 L. Ed. 643;

United States v. Bransen, 9th C.C., 142 F. 2d at 235.

D. *NO MONTANA STATUTES WERE INVOLVED PRIOR TO SUMMARY JUDGMENT.*

Under the factual position taken by petitioner in the District Court prior to summary judgment, as well as the legal theory upon which he then rested his case, the partnership and recording statutes of Montana now referred to in the application for the writ had no bearing nor application whatsoever, and were simply not involved in the case. In any event, there has never been any specific factual showing how the filing and recording of the alleged purchase agreement of June 17, 1952, even if it were established that it is an authentic agreement and not a falsified or doctored one as adjudicated in Civil No. 1557 referred to above, could invalidate the subsequent plain and specific assignment of December 5, 1952, on which respondent relies. If the purchase agreement of June 17, 1952, was authentic and valid, and if it was pertinent, the terms and provisions of the agreement were merged in and erased by the terms and provisions of the subsequent and later specific assignment of December 5, 1952, on which we rely.

Humble v. St. John, 72 Mont. 519, 234 Pac. 475.

E. *NO CONFLICT OF DECISIONS.*

The petition recites some thirteen federal court decisions which petitioner says are in conflict wth the judgment in this case. We have read each and every one of these decisions, and they simply do not involve the same

problems. It is elementary that if there had been presented to the District Court prior to summary judgment a factual showing that would constitute a genuine issue of fact, then summary judgment should not have been granted. Such is not the fact situation in this case. In this case, the petitioner prior to summary judgment admitted and agreed and conceded the truth and validity of all the facts that were then before the court, and did not present or assert any conflicting evidence. Before summary judgment, petitioner was simply relying upon a legal theory which petitioner then had which was not a sound legal theory. After summary judgment, by way of motion for new trial submitted through new and different counsel, petitioner changed the factual position and legal position which he had presented to the District Court before summary judgment, and asserted new evidence never presented before. The evidence then submitted, however, did not fulfill the legal or factual requirements laid down by cases in all jurisdictions necessary as a condition precedent to invoke the discretion of the District Court and permit it to grant a new trial.

Of the thirteen decisions of our Federal Courts cited and relied upon by petitioner, we shall select only one which in our opinion demonstrates so conclusively why there is no conflict in view of the particular facts of this case. In *Associated Press v. United States (1945), 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013,* summary judgment had been granted by the District Court. It was

affirmed in the Circuit Court. Appeal was taken to the Supreme Court of the United States by the government which contended that there were genuine disputes as to material facts, that the case therefore should have gone to trial, and that summary judgment was not proper. In denying this contention, this Court said in part:

> "* * * None of the appellants has pointed to any disputed facts essential to a determination of the validity or invalidity of the By-Laws and the contract. Admitting the existence of both the By-Laws and the contract, their answers and their affidavits in the summary proceedings defended the legality of the restrictive arrangements, but did not in any instance deny that non-members of AP were denied access to news of AP and of all of its member publishers by reason of the concerted arrangements between the appellants. Nor was it denied that the By-Laws granted AP members powers to impose restrictive conditions upon admission to membership of non-member competitors. The court below in making findings and entering judgment carefully abstained from the consideration of any evidence which might possibly be in dispute. We agree that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them. (Citing case.) There was no injury to any of the appellants as a result of the summary proceedings since, for reasons to be indicated, the restrictive arrangements which appellants admitted, were sufficient to justify summary action by the court at that stage of the case." *(65 S. Ct. at 1418.)*

In this case there was no issue of fact before summary judgment.

Petitioner likewise states in his application for the writ that the decision is in conflict with prior decisions of the Ninth Circuit Court. Again we have read all of

the cases cited, and none of them has any bearing whatsoever upon the facts or record background of this case. For example is *Gile v. Duke, 1925, 9th C. C., 5 F.2d 952,* in which the court simply held that a plaintiff may be permitted to supply defects and omissions in proof after a motion for nonsuit has been presented. Whether this should be done, of course, rests within the discretion of the District Court.

It would unduly extend this brief to refer to or discuss the other cases cited. Suffice it to say at this point that they simply do not involve the same factual background, or record status involved in this case.

CONCLUSION

The brief of petitioner and argument in support of the request for issuance of a writ show clearly that the case is not one of broad application and importance; that it does not deal with important legal principles as to which courts are in conflict; but rather that it involves merely an attempt by petitioner to obtain a second appelate review of an adverse decision against him.

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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PROOF OF SERVICE

I, CALE CROWLEY, one of the attorneys for Collins G. Reed, respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day of November, 1966, I served three copies of the foregoing Brief of Respondent Reed in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, as follows:

On Mondakota Gas Company, a corporation, petitioner, by mailing copies in duly addressed envelope, with first class postage prepaid, to its attorney of record, as follows:

To: Daryl E. Engebregson, Esq., Attorney for Petitioner, 307 Fratt Building, Billings, Montana.

CALE CROWLEY
Attorney for Respondent
500 Electric Building,
P. O. Box 2529
Billings, Montana 59103